

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

HELEN LOREE KNOLL

Claimant

V.

U.S.D. 233

Self-Insured Respondent

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Docket No. 1,058,485

ORDER

On August 31, 2016, respondent filed a Motion to Stay Payment of Award with the Board in order to stay the payment of disability payments ordered by the Board pending a decision of the Kansas Court of Appeals in this matter.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Kip A. Kubin, of Leawood, Kansas, appeared for self-insured respondent.

ISSUES

Respondent appealed the Board's June 29, 2016, Order in this matter to the Kansas Court of Appeals. Respondent requests a stay of the payment of benefits pursuant to K.S.A. 44-556(b), *Nuessen*¹ and K.S.A. 77-616, pending the decision of the Court. Respondent contends that it is unfair for claimant to receive the benefits granted in the award prior to the final determination of the issues by the Court, with no risk to claimant of having to return the benefits.

Claimant contends respondent made no serious attempt to prove any of the elements necessary to grant a stay. Therefore, the motion should be denied.

FINDINGS OF FACT

Claimant suffered a work-related accident on October 29, 2009. She was provided medical treatment, including surgeries to her right knee and right hip and continued to receive either medical evaluations and/or treatment into 2015.

Effective May 15, 2011, K.S.A. 44-523(f) was amended to limit the time an injured worker could proceed to a regular hearing, a settlement hearing or an agreed award under the Workers Compensation Act (Act) from five years to three years. Even though claimant

¹ *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P.3d 587 (2015).

suffered a work-related accident on October 29, 2009, her Application For Hearing was not filed until November 17, 2011.

On March 4, 2015, claimant filed a motion requesting an extension of time under K.S.A. 44-523(f). This motion was filed more than three years after the filing of the Application For Hearing, but less than five years from that filing. Claimant contends the pre-May 15, 2011, version of K.S.A. 44-523(f) with its five-year limitation applies. Respondent contends, as claimant filed her application for hearing after the statute was amended, the more recent and shorter version of the statutory time limit applies and its Motion to Dismiss should be granted.

This issue was appealed to the Board from the February 3, 2016, Order of the ALJ. The Board affirmed the determination by the ALJ that the longer, five-year time limit applied, holding the date of accident was the triggering event.

Respondent requests a stay in this matter on payment of benefits described in K.S.A. 44-556(b), pending the decision of the Court, pursuant to *Nuessen* and K.S.A. 77-616. Respondent contends that it is unfair for claimant to obtain the benefits of the award prior to the final determination of the same by the courts with no risk of having to return the benefits.

Respondent further argues that if claimant is paid the funds which would be due and owing without benefit of the stay, the payment to claimant would exceed \$89,000. If the Award is reversed by the Court, the funds would be reimbursed from the Kansas Workers Compensation Second Injury Fund and not from claimant. Respondent describes this as a possible "windfall" to claimant.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 77-616 states:

- (a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.
- (b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.
- (c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare, the court may not grant relief unless it finds that:
 - (1) The applicant is likely to prevail when the court finally disposes of the matter;
 - (2) without relief the applicant will suffer irreparable injury;
 - (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and
 - (4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

(d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.

(e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms or granting other temporary remedies. As used in this subsection, "appropriate terms" may include requirement of a bond.

(f) Except as otherwise authorized by rule of the supreme court, the court shall not issue any ex parte order pursuant to this section.

(g) This section shall not apply to proceedings under K.S.A. 66-118g through 66-118k, and amendments thereto.

K.S.A. 2009 Supp. 44-556(b) states:

(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

Traditionally, the Board held that K.S.A. 44-556(b) contained an automatic stay provision for the payment of benefits pending an appeal to the Court of Appeals, except the weekly benefits provided therein. However, the Court of Appeals, in *Nuessen*, determined the Kansas legislature, in modifying the Kansas Workers Compensation Act (Act) in 1993, intended to remove the automatic stay for workers compensation benefits, effective with the 1993 statutory revisions to the Act. As noted in *Nuessen*, the Kansas Supreme Court, in *Acosta*², stated it:

“ ‘is the declared public policy of the state that compensation awards shall be promptly paid, and [K.S.A. 44-512a] is the means selected by the Legislature to insure their enforcement and applies to all awards and judgments without the slightest qualification.’ ”³

The Court of Appeals interpreted the Supreme Court's reference to K.S.A. 44-512a as support for the view K.S.A. 2009 Supp. 44-556(b) does not provide for an automatic stay of workers compensation benefits while judicial review is pending, as had been previously found by the Board.⁴

² *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

³ *Id.* at 398-399.

⁴ *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P.3d 587 (2015).

The Board must determine whether respondent's request for a stay should be granted. K.S.A. 77-616 does not make a stay mandatory by the agency. That determination is at the discretion of the agency involved in the litigation, as noted in the statutory language providing the "agency may grant a stay".

Respondent argues claimant will obtain a windfall if this stay is not granted. Also, the detriment to the Kansas Workers Compensation Fund (Fund) is raised if this payment is not stayed. Neither argument persuades the Board in this instance. The Fund was created in part, to ensure prompt payment of benefits to claimants who may be strapped for funds during a time they are without income due to their inability to work as the result of work-related injuries. The threat to the Fund is minor compared to the damage that may result to a claimant unjustly deprived of income for long periods of time.

Respondent contends the late filing of the Application For Hearing by claimant determines which version of the statute applies. The Court of Appeals does not agree. The Court in *Welty*⁵, was asked to consider this issue. The employer in *Welty*, argued that the claim must be dismissed because the claimant's final hearing did not occur within 5 years of the date of the filing of an application. *Welty* argued the statute should be applied prospectively from July 1, 2006, when the law took effect, and therefore, does not apply to *Welty*'s case.

The employer in *Welty* contended K.S.A. 44-523(f) was a statute of limitations and considered procedural. Therefore, the statute would be retroactively applied. The Court, citing *Bryant*⁶, discussed the *Bryant* Court's reasoning that, as a general rule, a statute operates prospectively in the absence of clear statutory language that the legislature intended it to operate retroactively. The Court noted that even if the legislature expressly stated that a statute will apply retroactively, vested or substantive rights are immune from retrospective statutory application, and any retroactive application of laws that adversely affect substantive rights violates a claimant's constitutional rights, as a taking of property without due process of law.⁷ Neither the Court's reading of *Bryant*, nor the language of the statute convinced the Court to apply the statute retroactively. The Court of Appeals noted that the right to compensation accrues from the date of accident, citing *Kimber*⁸. Respondent's argument that the more recent version of K.S.A. 44-523(f) applies, is rejected. The date of accident controls.

⁵ *Welty v. U.S.D. No. 259*, 48 Kan. App. 2d 797, 302 P.3d 1080 (2012).

⁶ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

⁷ *Id.* at 588.

⁸ *Kimber v U.S.D. No. 418*, 24 Kan. App. 2d 280, 944 P.2d 169 (1997).

Because respondent failed to persuade the Board of its position regarding which version of K.S.A. 44-523(f) applies to this matter, the Board finds no justification to grant respondent's motion. Respondent's Motion For Stay is denied.

CONCLUSIONS

Respondent has failed to persuade the Board that a stay of the payment of benefits in this instance is appropriate or justified under K.S.A. 77-616. Respondent's Motion For Stay is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Respondent's Motion to Stay Payment of Award is denied.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge